IN THE HIGH COURT OF UGANDA AT SOROTI

CIVIL APPEAL NO. 41 OF 2012

ARISING FROM BUKEDEA CIVIL SUIT 42 OF 2004

ROSE AKURUT ……APPELLANT

V

1.KUMI DISTRICT COUNCIL

2.BUKEDEA COUNTY COUNCIL

3. BOARD OF GOVERNORS , BUKEDEA S.S

JUDGMENT

The appellant through her advocates Omongole & Co. Advocates appeals the judgment of HW Catherine Agwero Magistrate Grade one dated 13th July 2012 sitting at Bukedea on seven grounds of appeal that I will revert to later in the judgment.

The 1st and 2nd respondents were represented by the Attorney General's chambers Mbale.

A notice of instructions filed on 21.11.2013 shows the 3rd respondent is represented by Anukur & Co. Advocates. On 30.10.2014 the Assistant registrar wrote to counsel for the third respondent to file written submission by 12.11.2014. As I write this judgment, there has been no response from counsel .

Counsel for the appellant, and counsel for the 1st and 2nd respondent filed written submissions supported by authorities that I have carefully read and considered.

Writing of this judgment was delayed by the absence of typed proceedings of the lower court . Early this year, I discovered there were no typed proceedings on record when I took out the file to write judgment although counsel for the appellant and counsel for the 1st and 2nd respondents filed written submissions in time. It was at this point that I directed proceedings be typed which took almost ten months as the assistant registrar had to locate a secretary who was conversant with the handwriting of the trial magistrate.

The duty of an appellate court is to re-evaluate the evidence and arrive at its own conclusion bearing in mind that the trial court had the opportunity to observe the demeanor of the witnesses.

In her amended plaint, the appellant avers that her land measuring 12 acres was trespassed on and acquired by the respondents and the third respondent converted the said land without paying compensation to the appellant.

That the respondents and their agents in May 1999 trespassed upon the said land and forcefully evicted the appellant thereby depriving her of possession and use.

That the respondents' agents destroyed five grass thatched houses, and crops valued at 4,950,000/. Other property carried away was valued at 6,566,000/.

In their joint written statement of defense, the defendants denied liability and raised a defense of claim of right based on acquisition by Government for over 40 years.

The appellant's evidence as PW2 was that she inherited an unknown acreage of land from her late father Opolot who died in 1949. The land neighbors the third defendant and that her father gave her the land in 1935. That her father inherited the land from her grandfather Anguria both of whom are buried on the disputed

land, according to the appellant. The trial magistrate visited the locus and saw a burial ground. The appellant admits that the school of the third defendant was built in Obote's regime.

PW2 the appellant admits that when she was born, the sub county was in existence and that in 1947, the sub county was not using the disputed land. That when the school was constructed, she did not object to its construction.

PW1 Mary Atekeit states that the school has existed for over forty years. This witness did not give the acreage of land in dispute.

Her witnesses generally support her claims that she inherited the land from her late father and that she lived on the land until 1999 when she was evicted.

PW3 Erisa Namasa puts the size of the disputed land at 60 acres.

PW4 Eroitai James testified that the foundation stone of the school was laid in 1982 and that people who stayed on the land were told to vacate but the appellant refused to leave.

The appellant's son, PW5 Okiria Michael testified that he lived on the disputed land and in 1999, armed Local Administration police came to their home with guns, and demolished their home.

With regard to property destroyed during the eviction, the appellant named two gardens of cassava, one garden of beans, one garden of groundnuts, two gardens of green peas, one garden of sweet potatoes, three gardens of cow peas.

In her judgment, the trial magistrate recorded that 200 acres were in dispute , a fact that emerged during the locus visit.

An examination of the record shows that the third respondent is the one alleged to have trespassed on the disputed land while the 2nd respondent was sued because of actions of its agents(local administration police) in the eviction process and the 1st respondent was sued because it was the district local government responsible for the 2nd respondent and Local administration police. This conclusion is consistent with the appellant's claim as pleaded in the plaint.

DW1 Eriya Ayide, a ninety year old retired sub parish chief testified that he lived with his brother a muluka chief by the same name as the witness, Eria Ayide. According to this witness, his brother built a home on the land which is now claimed by the appellant. In the course of time, his brother courted the appellant's sister and married her. That this was when the appellant's father by the name Itagi was allowed to stay on the land together with the brother of the witness. Subsequently, Eria informed Itagi that the land belonged to government and that Itagi should leave. Shortly after getting this information, Eria left the land but Itagi refused to leave. In re-examination in chief, the evidence of the witness is that his brother was asked to leave the land in 1949 while the school had been in existence for thirty years.

That after Itagi's death, the school was built near the land occupied by the appellant. According to PW 3 Erotai John, the foundation stone for the school was laid in 1982, which is approximately 30 years to the date when the witness testified.

DW2 Erisama Omoding, a retired clerk to Kachumbala sub county somewhat supported PW1 when he testified that Itagi was brought as a herdsman by a sub county chief of Bukedea about the year 1939 and later his daughter got married to Ayide. That the town council existed before the school and during this time, Itagi

never laid claim to the land. According to DW2, Itagi never had a dispute with the church because the church was built in 1920 while Itagi settled on the land in 1947.

The evidence of DW2 further shows that when Itagi died, the appellant left to leave with her in laws and for more than ten years , no one lived on the disputed land. That she returned after the school had been built.

According to this witness, the land originally belonged to Bukedea sub county but was donated to the school by a council resolution during the time he was clerk to the council.

The evidence of DW3 Geresemu Ilukor is that in 1921, Bukedea sub county was gazetted . The gazette Dexh. 1 shows that the area within the radius of half a mile from Bukedea market was declared sub county sub –county.

According to this witness, Bukedea S.S was established in 1982 and he became Board of Governors Chairman from 1983 to 2004. It was when he became board chairman that he discovered two persons on school land in the persons of the appellant and another person who lived across the railway.

The witness learnt that in 1958, Bukedea council resolved that a school and university be established and all persons on the land were asked to leave. That these people were relocated to other places including Amuria.

The witness established that the appellant had two houses and a kitchen. There was no mention of land for cultivation. During his tenure, there was no dispute between the school and the appellant.

His evidence is that the appellant was evicted by government and not the school and the land she occupied was returned to the school. In all, the school was on about 100 acres.

DW4 Atiroyang Caucas a former headmaster of the school confirms that the appellant lived on the school land . Many other people cultivated school land but they left. That the appellant used to hire out church and school land to other people.

From the above narrative, several facts emerge.

1. Bukedea sub-county was gazetted in 1927 and at the time , its radius was half-mile from the centre of Bukedea market.

2. In 1982, a foundation stone was laid for Bukedea S.S .

3. According to DW3 Ilukor it was in 1958 that Bukedea sub-county resolved to assign land for a school and university . In 1983 when he became board chairman, the school had about 100 acres.

4. The appellant lived on a portion of the school land both before the foundation stone was laid and after. i.e. long before 1982 and after 1982. According to her evidence she had constructed five grass thatched houses and several gardens of crops. The bit about the grass thatched houses is confirmed by DW3 Bishop Ilukor who said there were two houses and a kitchen . The bit about the gardens is disputed by all defense witnesses. PW1 Atekit talks of many gardens, while in her evidence, the appellant speaks of ten gardens from where crops were destroyed.PW3 Erisa Namasa talks of 60 gardens. In the plaint the claim is for 12 gardens. At the locus, there was mention of 200 acres. On the basis of these various accounts, I find that the

only consistency is on the existence of grass thatched houses that the trial magistrate placed at three. I accordingly agree with the trial magistrate that the appellant proved the existence of three thatched houses that were destroyed during an eviction in 1999.

5. The appellant acquiesced when the school was built in 1982. In own words,

> ‘ I did not complain that time because I wanted the children to have a school nearby.’ Page 23 of typed proceedings.’

6. Prior to 1982, the appellant’s father settled on the land about the year 1935 when he worked as a herdsman for a sub-county chief. I take this to be the fact because the appellant does not explain how her father came to be on the land except that he was born there. Whether he was born there or settled on the land, the fact remains that the appellant was on the land prior to 1982 when the school was established.

7. It can be safely concluded that the land on which the school was established in 1982 was part of sub county land gazette in 1927 by the colonial government. As such, since 1927, the sub –county and now Bukedea district local government had an equitable interest in the land irrespective of the fact that no statutory lease was produced in evidence.

8. I also find that during her father’s lifetime , he was required to leave the land as it belonged to the sub-county but he resisted. Evidence of DW1 Ayide and DW2 Omoding is relevant. In 1992, Dexh. 3 shows the Chief Administrative Officer of Kumi convened a meeting in which it was agreed that the appellant leaves the land as it belonged to the school.

9. The respondents' witnesses admit that the appellant occupied part of school land as they knew it having been administrators of the school after 1982.

10. The appellant herself admits to being near the school land although she denies being on school land. This is a contradiction because she agreed to the establishment of the school possibly because she knew it was local government land. I find that the appellant was living on the school land and this explains why she was evicted in 1999, long after the promulgation of the 1995 Constitution that abolished the compulsory acquisition of land.

11. Apart from the three grass thatched houses, there was no evidence adduced to prove the crops destroyed. The appellant merely refers to crops in gardens without stating whether they were grazed down or slashed. The evidence about crops is highly suspect because of the different accounts of the size of the gardens by the appellant and her witnesses. The respondents' witnesses suggest she did not do any cultivation or if she did, the gardens were hired out to other people. Under these circumstances, I find that the only property destroyed was three grass thatched houses.

Grounds of appeal one, two and seven

Turning to the grounds of appeal, ground one is that the trial magistrate erred both in fact and in law when she dismissed the plaintiff's case. Ground two is that the trial magistrate erred in fact and in law in holding that the plaintiff is not a customary owner of the suit land nor a bona fide /lawful occupant. Ground seven is that the trial magistrate erred both in fact and in law in not properly evaluating the evidence thus arriving at a wrong conclusion.

Counsel for the appellant argued that the appellant held the land under a customary tenure as defined in section 3 of the Land Act 1998. The basis of counsel's submission is because the appellant inherited the land from her father.

I have found that the appellant lived on a portion of the land she claims both before 1982 when the foundation stone for Bukedea S.S was laid and after until 1999 when she was evicted. Her father Opolot alias Itagi died about the year 1949 and she was born in 1935. Although DW2 Omoding claims the appellant left the land and returned later, DW3 Bishop Ilukor confirmed the appellant lived peacefully in two grass thatched houses near the school when he became Board of Governors Chairman in 1983.

I also found that the same land was part of land gazetted in 1927 as Bukedea sub-county by the colonial government. That is why DW1 Ayide testified that her father Itagi but whom the appellant referred to as Opolot was required by the chiefs to leave the land as it was sub-county land.

No evidence to was adduced to prove that the appellant occupied clan land yet customary tenure must be proved. I find that the appellant could not have held land under customary tenure prior to 1995 . I say this because section 24 (1) (a) of the Public Lands Act 1969 abolished customary tenure on land in urban areas. The land occupied by the appellant was not available for occupation under customary tenure by operation of law whether after 1969 or before having been gazetted as sub county land. As counsel for the 1st and 2nd respondent submitted, the gazette was notice to the whole world of the interest of the local government.

Counsel for the appellant submitted that merely gazetting land is not the same as acquiring a statutory lease. An examination of this gazette shows all towns and sub counties in the country were gazetted at this time. That was the procedure for curving out land for urban development . Statutory leases were introduced in 1969 and if the sub county did not take out one at the time, it still has an equitable interest that is superior to whatever interest the appellant had.

The defence case was able to show that the land was gazetted by 1927 and it was after this date that the appellant's father came as a herdsman and later built a house. The existence of a burial ground on the land is not sufficient proof of land held under customary tenure.

Mere inheritance from her father did not mean the land was held under customary tenure.

The fact that this land was gazetted in 1927 for Bukedea sub –county means that anyone settling on the land after that date did so subject to the equitable interest of the sub-county.

It seems the appellant's father and the appellant were squatters on this portion of land from the time they settled on it after 1927 to the time of eviction in 1999.

Prior to 1982, the appellant was never challenged in her possession from the time she inherited the land from her father in 1949. It was in 1992 when she was required to leave and finally in 1999 when she was forced out of the land.

In Kampala Distirct Land Board & George Mitala v Venansio Babweyaka & three ors, Supreme Court Civil Appeal No. 2 of 2007, the Supreme Court

held that although the respondents were mere licensees on land in an urban area, they were bona fide occupants under section 29(2) of the Land Act 1998.

Section 29(2) of the Land Act defines boa fide occupant.

"(2) "Bona fide occupant" means a person who

before the coming in force of the Constitution –

(a) had occupied and utilised or developed any land unchallenged by the registered owner or agent of the registered owner for twelve years or more."

From 1949 to 1982, the appellant occupied the land undisturbed. It was during this period that she was in adverse possession that she acquired the status of bona fide occupant.

In the **Kampala district Land board** case (supra) the respondents purchased the suit land in 1998 from persons who had occupied and utilized the land since 1970. The Supreme Court found them to be bona fide occupants.

Similarly, I find that the appellant acquired this status when she remained on the land undisturbed from 1949 to 1982 when the school was built next to where she lived. Counsel for the respondent submitted that the possession by the appellant was not continuous in order for her to benefit from the limitation period. I find that the appellant was undisturbed until 1982 when the foundation stone for the school was laid to which she acquiesced . It was not until 1992 that she was formally

told to leave in a meeting chaired by the LC V Chairman Kumi Haj Umar Okodel, (Dexh. 3)

In her plaint, the appellant seeks compensation for the land she was evicted from measuring 12 acres. I have found that this claim is not supported by evidence and I concluded that the appellant occupied land on which she had three grass thatched houses (includes a kitchen) . It is for this portion that she is entitled to compensation.

From the evidence of DW3 Ilukor, the land was given for establishment for a school and university by Bukedea sub county council sometime in 1958.

A title was acquired by the registered Trustees of Church of Uganda in 2012(Dexh.6). At the time of filing the suit in 2004, Kumi District Local Government was in control of Bukedea sub county. Now that the 1st respondent is no longer in control of Bukedea sub-county, it cannot be held liable to compensate the appellant.

I find that liability to compensate the appellant lies with the third respondent who control the school which subsequently took over the land after the eviction in 1999.

Ground one, two, and seven succeed in part in as far as the appellant was a bona fide occupant on a portion of land with three grass thatched houses.

Grounds of appeal three and four

Ground three is that the trial magistrate erred both in fact and in law when she held that the suit land belongs to Government of Uganda whereas not.

I have found that the land belonged to Bukedea sub-county Local Government at the time the suit was filed, while the appellant was in possession as a bona fide occupant. This ground therefore fails.

Ground four is that the trial magistrate erred both in fact and in law when she failed to find that the defendants trespassed on the land.

In Justin Lutaya v Stirling Civil Engineering company Supreme Court civil Appeal 11 of 2002, the Supreme Court defined trespass as an unauthorized entry upon land that interferes with another person's lawful possession. In the instant appeal, it is irrelevant that the appellant was a squatter . What is material is that she was in possession of the three grass thatched houses.

Section 32(A) of The Land amendment Act 2010 introduced the requirement that for a registered owner to evict a bona fide occupant, a court order is required.

There is evidence that the appellant was forcefully removed from the land when her grass thatched house were destroyed. The evidence of PW5 Okiria Michael shows that local administration police armed with guns demolished the house.

This was arbitrary conduct on the part of the 2nd respondent's agents who is vicariously liable. The trial magistrate erred when she found there was no trespass because the appellant had failed to prove ownership of land. As held in the **Lutaya case (supra)** a person suing in trespass to land only has to prove exclusive possession and not ownership. The appellant had been in possession of a portion of land since the 1940s. . I find that the agents of the 2nd respondent trespassed on the portion of land occupied by the appellant

Although the trial magistrate found there was no trespass, she correctly found that the agents of the 2nd respondent acted unlawfully when they evicted the appellant

without a court order and proceeded to award the appellant 5,000,000/ as general damages.

I find no reason to disturb that award. Ground four succeeds in part.

Ground five

The trial magistrate erred both in law and in fact when she rightly awarded compensation but failed to award sufficient general damages and interest.

The award of general damages has been dealt with under ground four.

With regards to compensation, I agree with counsel for the 1st and 2nd respondents submissions that the damaged crops were not proved. Both PW5 Okiria son to appellant made casual references to crops. The evidence adduced by the appellant with regard crops destroyed is too scanty to support an award of compensation. I therefore find that no compensation for crops ought to have been made .

In the result, this appeal succeeds in part.

I make the following orders:

1. The appellant is entitled to compensation from the third respondent for the portion of land upon which she had constructed three grass thatched houses.
2. The amount of compensation shall be determined by a registered valuer , appointed by the assistant registrar, Soroti.

3. The valuation to be completed within two months from the date of this judgment and a valuation report submitted to the assistant registrar Soroti High Court within the same time frame.

4. The compensation determined by the valuer shall be paid within three months from the date when such valuation is communicated to the assistant registrar, Soroti.

5. The appellant is entitled to half the taxed costs both in the High court and Magistrates court and as against the second and third respondent.

DATED AT SOROTI THIS 10TH DAY OF DECEMBER 2014.

HON. LADY JUSTICE H. WOLAYO